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In The

Supreme Court of the United States

OCTOBER TERM, 1982

No. _____

KENNETH KOLOJAY, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NITZ & SCHOFIELD, LTD.
By PAUL H. SCHOFIELD
516 South Third Street
Las Vegas, Nevada 89101
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QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal grand jury is without jurisdiction to indict an individual for violation of 18 USC §1623, false declarations before a grand jury, when the record reveals the federal district trial court ruled it had no jurisdiction over the subject matter and where the record further reveals the grand jury was not investigating even a possible violation of federal law but was investigating only a fire or an arson.

PARTIES TO PROCEEDING IN UNITED STATES COURT OF APPEALS

1. Kenneth Kolojay, Petitioner herein.

2. United States of America, Respondent herein.

3. William Apfel*

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* William Apfel was a party to the appeal to the United States Court of Appeals but was not a party to the Petition for Rehearing to the United States Court of Appeals.
William Apfel is now deceased.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, KENNETH KOLOJAY, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 26, 1982, as well as the subsequent Order denying rehearing entered on June 7, 1982.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit dated April 26, 1982, not yet reported, appears in Appendix A at Page A-1, *infra.*

The Order of the United States Court of Appeals for the Ninth Circuit denying the Petition for Rehearing dated June 7, 1982, is printed at Page B-1, *infra,* and is not officially reported.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 26, 1982. A timely Petition for Rehearing *en banc* was denied on June 7, 1982, and this Petition for Certiorari was filed within 60 days of the date of denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), and under Rules 17.1 and 20.4 of the United States Supreme Court Rules.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The case involves the following statutes and constitutional provisions:

Title 18, United States Code, Section 844(i):

> "(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive,

any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title."

Title 18, United States Code, Section 844(j):

"(j) For the purposes of subsections (d), (e), (f), (g), (h), and (i) of this section, the term 'explosive' means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion."

Title 18, United States Code, Section 1623(a):

"(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

United States Constitution, Amendment X:

> "Powers reserved to states, people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATEMENT OF THE CASE

On December 3, 1979, the Petitioner, KENNETH KOLOJAY, was indicted on a four count indictment by the federal grand jury. In said indictment, KENNETH KOLOJAY was charged with violation of 18 U.S.C. §844(i), malicious destruction of property used in an activity affecting interstate commerce by means of explosive. In the same count, MR. KOLOJAY was also charged with violation of 18 U.S.C. §2, aiding and abetting. The second count charged KEN KOLOJAY with the violation of 18 U.S.C. §371, conspiracy. MR. KOLOJAY was also charged with violation of 18 U.S.C. §1503, obstruction of justice, as well as violation of 18 U.S.C. §1623, false declaration before a federal grand jury.

Prior to the time of trial, MR. KOLOJAY moved to dismiss the indictment on the grounds that the Federal Court had no jurisdiction in that the fire was what might be termed one of local nature.

The Court denied the pre-trial motion to dismiss and the matter subsequently proceeded to trial.

Upon the close of the UNITED STATES GOVERNMENT'S case, MR. KOLOJAY moved the Court, under authority of Federal Rules of Criminal Procedure 29(a), for judgment of acquittal.

The basis of MR. KOLOJAY'S motion for judgment of acquittal was that even on its face it was obvious that the destruction of the Chicken Ranch Brothel[1] was by fire and not by means of an explosive as set forth in 18 U.S.C. §844(i).

The Court after hearing the evidence of the UNITED STATES OF AMERICA, inclusive of the UNITED STATES' expert witness, and relying upon *United States v. Birchfield*, 486 F. Supp. 137 (M.D. Tenn. 1980), ruled that it did not have jurisdiction in that the evidence showed that the fire was caused by the utilization of a match which ignited a flammable liquid. Therefore, because there had been no violation of 18 U.S.C. §844(i), the United States District Court granted judgment of acquittal as to the charges of the destruction of property by means of an explosive, aiding and abetting, and conspiracy. There then remained the charge of making false statements before a grand jury as to each of the defendants[2] as well as an

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[1] The premises destroyed by the fire on June 10, 1978, was a brothel located in Nye County, Nevada. Brothels are legal in Nye County, Nevada.

[2] In addition to the parties to proceeding in the United States Court of Appeals, there was a third defendant to the proceedings in the United States District Court, District of Nevada, with said third defendant being one James Luther Tatum. Mr. Tatum was not a party to the proceedings before the United States Court of Appeals.

additional charge against KENNETH KOLOJAY, with said charge being obstruction of justice. The Honorable District Court Judge ruled that the evidence was not believable as to that charge as had been presented to the jury and, therefore, granted judgment of acquittal as to that charge as to KENNETH KOLOJAY.

Although the District Court effectively ruled that it had no jurisdiction in regard to the burning of the Chicken Ranch, it allowed the charges of false declarations to a grand jury to stand as to each defendant and the matter proceeded through trial. KENNETH KOLOJAY, as well as the other defendants, was found guilty of violation of 18 U.S.C. §1623, making false declarations before a federal grand jury.

On March 30, 1981, KENNETH KOLOJAY filed his Notice of Appeal. The appeal was argued and submitted on April 6, 1982, and on April 26, 1982, the United States Court of Appeals for the Ninth Circuit affirmed the conviction. On June 7, 1982, the United States Court of Appeals for the Ninth Circuit denied KENNETH KOLOJAY'S Petition for Rehearing.

ARGUMENT — REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Ninth Circuit affirming the conviction of KENNETH KOLO-

JAY should be reviewed by this Court to resolve an apparent conflict of decisions between the Circuit Courts and more particularly to determine whether or not the Court of Appeals has departed from an accepted course of judicial proceeding. The decision should further be reviewed in that the United States Court of Appeals for the Ninth Circuit has decided on an important question of federal law which has not particularly been addressed by this Honorable Court.

The United States Court of Appeals, in relying upon its earlier decision in *United States v. Sisack*, 527 F.2d 917 (9th Cir. 1975), ruled that the grand jury had authority to investigate the burning of the Chicken Ranch Brothel on the proposition that the mere possibility that violations of federal law have occurred is sufficient to provide authority for a grand jury investigation.

However, review is necessary in that there is not in the record any evidence that the grand jury was looking into even "the mere possibility that violations of federal law have occurred". The only evidence presented to the Court and before the Court of Appeals was that the grand jury was investigating a fire.

The United States Court of Appeals' decision as it stands (when there is a total void of evidence that the grand jury was looking into even a possibility of violation of federal law) effectively is directly violative of the Tenth Amendment to the Constitution of the United States. The net effect of the Court

of Appeals' ruling is that a grand jury may look into any matter without the necessity of some indication in the record that the grand jury was looking into even a possible violation of federal law. State and local investigatory agencies are totally preempted even in a matter which is purely of a local nature.

The Court of Appeals in *United States v. Sisack, supra,* in holding that the mere possibility that violations of federal law have occurred is sufficient authority for a grand jury investigation, had before it in the record the grand jury foreman's testimony that the investigation of the grand jury had to do with how police pay-offs in the City affected the federal laws. Indeed, the trial court had allowed the United States of America to reopen its case to put before the Court and the jury the grand jury foreman's testimony so that there would be evidence to indicate the federal grand jury's authority to investigate.

In Petitioner's case, the evidence and, therefore, the record all confirmed one fact, to-wit: the grand jury was investigating the fire or arson of the Chicken Ranch Brothel.

While in *United States v. Sisack,* 527 F.2d 917 (9th Cir. 1975), the grand jury foreman testified that the grand jury was looking into possible federal law violations, such was not the case in regard to KENNETH KOLOJAY. The grand jury foreman testified that the grand jury was trying to determine

how or who the parties were responsible for the fire[3]. When KENNETH KOLOJAY appeared before the federal grand jury, he, too, was advised that the grand jury was looking into the fire and that he might be implicated in the arson.[4]

Although the Honorable United States Court of Appeals for the Ninth Circuit in its Opinion suggested that a mere possibility that a violation of federal law had occurred also existed because of the proscription of the use of interstate facilities with the intent to carry out arson which appears in 18 U.S.C. §1952, and the long reach of 18 U.S.C. §1961, et seq., the RICO

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3 Pages 174 and 175 of Volume IX of the transcript,

"Q. What position did you occupy in the grand jury?

A. I was the foreman.

Q. Mr. Williams, directing your attention to the late summer, autumn and early winter of 1979, was the grand jury conducting an investigation into or concerning a fire that had occurred at the Chicken Ranch Brothel in the Pahrump area?

A. Yes. We were.

Q. Basically in general terms, tell us what the purpose of the grand jury investigation was.

A. To determine how or who the parties were responsible for the fire. . . ."

4 Trial Exhibit 11 at Page 2,

". . . The grand jury at this time is conducting an investigation into a fire that occurred at the Chicken Ranch Brothel in Pahrump, Nevada, area on June 10, 1978. At this point in time you are one of the subjects of this investigation; that is to say, you are a target of this investigation. Do you understand what I am telling you? . . .

Allegations have been made which, if true, implicate you in the commission of that arson. Do you understand that? . . ."

statute, still there is no evidence in the record that the grand jury was looking into or investigating the possibility of violation of 18 U.S.C. §1952 or 18 U.S.C. §1961, et seq.

The entire posture of this petition is that this Honorable Court should review the United States Court of Appeals for the Ninth Circuit's affirmation and Memorandum Opinion because of the total void of any evidence whatsoever to even suggest the grand jury was investigating even a possible violation of federal law.

Had there been evidence before the Court that would suggest the grand jury's investigation of even the possibility of violation of federal law, review by this Court would not be appropriate. However, to hold, as the United States Court of Appeals for the Ninth Circuit has effectively held in the case at bar, that a grand jury effectively has power to investigate anything, simply allows federal intrusion never intended.

The United States District Court in *United States v. Birchfield*, 486 F.Supp. 137 (N.D. Tenn. 1980), in discussing the congressional intent of 18 U.S.C. §844(i), stated at 486 F.Supp. 137, 138, 139:

> ". . . The court will take judicial notice that the form of destruction described in paragraph 1 of the indictment is a very common means of arson, and in the absence of clear statutory language or a compelling legislative history, this Court must assume that Congress, in enacting 18

> U.S.C. §844, did not intend to exert federal jurisdiction over this traditional area of state concern. . . ."

KENNETH KOLOJAY'S petition for review by this Honorable Court is not one suggesting condemnation nor condonation of the grand jury system.

However, distinct lines must be drawn as to when a grand jury shall have jurisdiction, notwithstanding the fact that the Court lacks the same jurisdiction. It cannot be assumed that a federal grand jury is looking into a possible violation of federal law when all evidence is to the contrary.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

NITZ & SCHOFIELD, LTD.
By PAUL H. SCHOFIELD
Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee* *vs.* KENNETH KOLOJAY, *Defendant-Appellant.*	No. 81-1231 DC# CR LV 79-106-2 MEMORANDUM
UNITED STATES OF AMERICA, *Plaintiff-Appellee* *vs.* WILLIAM APFEL, *Defendant-Appellant.*	No. 81-1232 DC# CR LV 79-106-1

Appeal from the United States District Court
for the District of Nevada
Roger D. Foley, District Judge, Presiding
Argued and Submitted April 6, 1982

(April 26, 1982)

Before: WRIGHT and SNEED, Circuit Judges,
and KENYON*, District Judge

Appellants were indicted on seven counts, the first two of

* Honorable David V. Kenyon, United States District Judge for the Central District of California, sitting by designation.

which charged violations of 18 U.S.C. § 844(i) (malicious destruction of property used in an activity affecting interstate commerce by means of an explosive), and the fourth and fifth of which charged appellants Apfel and Kolojay, respectively, with a violation of 18 U.S.C. § 1623 (false declaration before a federal grand jury). Appellants were acquitted on all counts in which they were charged other than the fourth count in the case of Apfel and the fifth in the case of Kolojay. On these counts they were convicted. We affirm the convictions.

I.

THE ISSUES

This case grows out of a fire at the Chicken Ranch, a brothel in Pahrump, Nevada. The chief government witness testified that appellant Apfel, the owner of a competing brothel in Lathrop, Nevada, hired the witness, appellant Kolojay, and one other to destroy the Chicken Ranch and that the three of them caused the fire. To overturn their convictions appellants jointly raise two issues and appellant Kolojay raises one applicable only to him. The first two are:

(1) Did the grand jury, as the appellants insist, lack jurisdiction to investigate the Chicken Ranch fire?

(2) Did the government fail to produce *Brady* material and to comply with the Jencks Act?

The third, applicable only to appellant Kolojay, is:

(3) Was the evidence sufficient to support the verdict of guilty against Kolojay?

II.

JURISDICTION OF THE GRAND JURY

Appellants contend that because the grand jury, before whom they made statements determined by a jury to be false, lacked authority to investigate an incident which involved only the crime of arson under Nevada law, their statements, even if false, did not amount to a violation of 18 U.S.C. § 1623. We reject this contention because we hold that the grand jury had authority to investigate the burning of the Chicken Ranch.

The mere possibility that violations of federal law have occurred is sufficient to provide authority for a grand jury investigation. *United States v. Sisack*, 527 F.2d 917, 920 (9th Cir. 1975). The possibility in this case rests, in part, on the fact that at the time of the investigation the law was not settled with respect to whether the use of a match to ignite uncontained gasoline was the use of an explosive, as defined by 18 U.S.C. § 844(j), for the purposes of the crime defined in 18 U.S.C. § 844(i). Recent case law suggests that use of a match to ignite a flammable liquid is not an explosive. *See United States v. Gere*, 662 F.2d 1291 (9th Cir. 1981) (photocopier fluid); *United States v. Birchfield*, 486 F. Supp. 137 (M.D. Tenn. 1980) (gasoline). The trial court in this case apparently held the same view. This is not controlling, however. A conviction for perjury

can be sustained even though it is eventually determined that the suspected federal violation which prompted the investigation cannot properly be prosecuted. *United States v. Sisack,* 527 F.2d 917 (9th Cir. 1975); *United States v. McInnis,* 601 F.2d 1319 (5th Cir. 1979), *cert. denied,* 445 U.S. 962 (1980).

The possibility that a violation of federal law had occurred also existed because of the proscription of the use of interstate facilities with the intent to carry out arson which appears in 18 U.S.C. § 1952 and the long reach of 18 U.S.C. § 1961, *et seq.*, the RICO statute. Under the latter, arson could be "racketeering activity" under 18 U.S.C. §1961(1)(A), a pattern of which could give rise to a RICO violation.

Under these circumstances appellants' reliance on *Brown v. United States,* 245 F.2d 549 (8th Cir. 1957), is misplaced. Unlike the investigation in *Brown,* the investigation in this case followed closely after the wrongful conduct. Moreover, both the investigation and the conduct took place in the same state, Nevada, and appellants not unreasonably were charged with crimes other than perjury. In no sense can the grand jury investigation in this case be described as being close to a fraud on the court. *See United States v. Mandujano,* 425 U.S. 564, 582-83 n.8 (1976).

III.

THE JENCKS ACT AND BRADY ISSUES

The copies of the FBI agent memoranda containing reports

of interviews of two witnesses are not "statements" within the meaning of the Jencks Act, 18 U.S.C. § 3500. Nothing in the record indicates that the memoranda were adopted or approved by the witnesses. They are general reports of witness interviews dictated and typed several days after the interviews. *Cf.* 18 U.S.C. § 3500(e)(2). Also they are not statements made by a witness to a grand jury, *Cf.* 18 U.S.C. §3500(e)(3).

Nor does *Mims v. United States*, 332 F.2d 944 (10th Cir.), *cert. denied*, 379 U.S. 888 (1964), suggest a different conclusion. There the government conceded the memorandum was a "statement" and was adopted by the witness before he testified. *Id.* at 948. Nothing resembling that occurred here.

The appellants' contentions with respect to *Brady v. Maryland*, 373 U.S. 83 (1963), fare no better. The material contained in the two memoranda which the appellants assert contained exculpatory evidence either was known by the appellants and investigated by their counsel or was information elicited upon cross-examination during the government's case with respect to which the delay in its receipt does not cast the shadow of a reasonable doubt about the appellants' guilt.

IV.

KOLOJAY'S SUFFIENCY OF THE EVIDENCE ISSUE

Although the evidence pertaining to appellant Kolojay's conviction is in conflict, the jury chose to believe the witnesses

supporting the government's case. We cannot say that a rational trier of fact could not have come to that conclusion. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The verdict was not irrational.

Finally, we hold that the questions asked of appellant Kolojay before the grand jury were sufficiently precise and unambiguous to justify the conclusion that his responses were intentionally false. The government established beyond a reasonable doubt that the appellant Kolojay understood the questions as did the government when it asked them and that his responses were false. *See United States v. Matthews*, 589 F.2d 442, 445 (9th Cir. 1978), *cert. denied*, 440 U.S. 972 (1979).

AFFIRMED.

The mandate shall issue immediately.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee* *vs.* KENNETH KOLOJAY, *Defendant-Appellant.*	No. 81-1231 ORDER

(June 7, 1982)

Before: WRIGHT and SNEED, Circuit Judges, and KENYON*, District Judge

Appellant Kolojay's petition for rehearing is denied.

* Honorable David V. Kenyon, United States District Judge for the Central District of California, sitting by designation.